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CITATIONS

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 10321

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANT,

v.

J. S. SONDOCK AND M. G. SONDOCK, INDIVIDUALLY AND AS PARTNERS DOING BUSINESS UNDER THE NAME OF MCCANE-SONDOCK DETECTIVE AGENCY, APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HONORABLE THOMAS M. KENNERLY, JUDGE

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

STATEMENT

Nature of the case

This action was brought by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, to restrain appellees from violating certain provisions of the Act. The court below entered judgment denying the relief sought and from that judgment the Admin-

istrator has taken this appeal. The opinion below is reported in 43 F. Supp. 339, and appears at pages 220–236 of the printed record.[1]

STATUTE INVOLVED

A copy of the Act is attached as an appendix to this brief. The pertinent provisions are Sections 3 (b), 3 (j), 6, 7, 11 (c), 13 (a) (2), 15 (a) (2), 15 (a) (5), and 17.

PROCEEDINGS BELOW

On June 6, 1941, the Administrator filed his complaint (R. 6–11) against appellees alleging that many of their employees were engaged in interstate commerce and in the production of goods for commerce insofar as they watched, guarded and protected factories, warehouses and other establishments at which transactions in commerce and production for commerce were carried on. The complaint alleged further that appellees had failed to abide by the minimum wage requirements of Section 6, the maximum hour provisions of Section 7, and the record-keeping provisions of Section 11 (c) and prayed for an injunction restraining appellees from violations of Sections 15 (a) (2) and 15 (a) (5) of the Act.

Appellees' answer and amended answer (R. 24–28, 28–33), filed June 27 and November 3, 1941, respectively, conceded noncompliance with the wage, hour, and record-keeping provisions but denied the applicability of the Act to their employees' work. The answer also asserted, as an affirmative defense, that appellees' busi-

[1] References to the printed record on appeal are indicated by the symbol (R.)

ness constituted a "service establishment" within the exemption from Sections 6 and 7 provided by Section 13 (a) (2).

Appellees, operating as a partnership under the name of McCane-Sondock Detective Agency, employ approximately 34 night watchmen in and about Houston, Texas, to guard the premises of appellees' customers pursuant to contracts calling for prescribed protection. Some employees are assigned to guard industrial and commercial plants, warehouses, factories, and other establishments engaged in the production of goods for commerce or in interstate commerce, while others are detailed to watch private residences and retail and service establishments.[2] All watchmen are carried on appellees' pay roll and are employed by them, but work at the customers' establishments. The owners of the guarded premises pay appellees an agreed price for the work done by the watchmen.

The employees involved on this appeal fall into two categories: those whose work requires them to make regular rounds or beats throughout the night guarding a number and diversity of business establishments, and those assigned to guard exclusively the manufacturing establishment or plant of a single customer. Typical of employees in the first group is H. C. Holman, employed on appellees' beat 27 (R. 39, 56–62). This employee makes regular rounds of the establishments of 22 customers, of which five are factories producing

[2] This appeal does not involve employees in the latter category or those employees irregularly or occasionally employed by appellees for special assignments as private detectives or guards.

goods for interstate commerce, and eight are wholesale distributors of goods received in large part from other States and distributed within Texas and in substantial quantities directly into other States (R. 56–62). This employee also guards the establishments of an industrial welder and of a concern engaged in the transportation of heavy machinery used in the production of oil for interstate commerce.

Employees making regular nightly rounds carry watchmen's clocks into which, at each place guarded, they insert numbered keys which are located at points in and about the customer's place of business (R. 187–188). These keys are so located as to require the watchman to cover the entirety of the customer's plant, thereby insuring the maximum protection against fire, theft, and other hazards of the night (R. 126, 175, 189–190). The group of watchmen who devote their time exclusively to the protection of plants of individual customers perform similar functions except that their continuous presence throughout the night is required in and about the factory, warehouse, or other place of business in which they work (R. 40–47, 97, 99, 105, 123, 125, 133, 140, 164).

Although appellees maintain an office in Houston, none of these employees performs any functions there, since they do all their work at the customers' establishments (R. 35, 133). Most of the men stop at the office in the evening merely for the purpose of having changed the nightly recording sheet or paper dial in their watchmen's clocks (R. 151, 213); others report to the office only for their biweekly pay checks (R. 127, 136).

Appellees maintain stations at three points in the city from which their watchmen may call in to the office (R. 212). This, together with the fact that a number of the beats laid out for the men intersect (R. 200), enables appellees to be reasonably certain that their employees are performing their required duties at their customers' places of business.

Although technically under the direction of appellees, the watchmen are actually supervised, in many instances, by appellees' customers. Watchmen whose work is unsatisfactory to the customer are replaced upon request (R. 122, 216) and in one instance the watchman's wages and hours were prescribed by the customer (R. 216). All of appellees' customers find the employment of watchmen necessary to the proper operation of their businesses. Many, before entering into contract with appellees, employed men on their own pay rolls to perform the same tasks (R. 100, 122, 163–165). In several instances the same watchmen who are now on appellees' pay roll were formely employed for the same work by the manufacturers and distributors whose plants they continue to guard (R. 101, 122, 163–165). Sometimes appellees hire the customer's former watchman at the suggestion and upon the recommendation of the customer (R. 122). Other businesses, after discontinuing their contracts with appellees, have undertaken to re-employ watchmen (R. 91–92, 105–106) and frequently hire the man previously furnished by appellees (R. 91–92, 138–139, 163–165).

The watchmen guard raw, semi-finished and finished products being produced for commerce or awaiting

shipment in interstate commerce (R. 92–93, 97, 134); they protect the plants and premises of their employers' customers from marauders and thieves and guard against fires (R. 126, 175, 189–190). The premises protected include open areas in which materials are stored and which have no other protection (R. 93, 97, 124), as well as railroad sidings by means of which goods are received from out-of-State sources and shipped to extrastate destinations (R. 92, 99, 104, 121).

Appellees' customers include several scrap metal dealers who break the scrap into convenient form for shipment to extrastate points by rail and water (R. 41, 43–46, 67, 95, 96, 99); plants engaged in the reclaiming of rubber and the retreading of tires (R. 55, 58) shipped to out-of-State points; manufacturers of electrical equipment (R. 63, 72); producers of paint and varnish (R. 119); printers and lithographers (R. 54, 65, 68, 114); concerns manufacturing creosoted timber products (R. 106) and oil well equipment (R. 70, 71, 74); and canners of food products (R. 49, 54, 56), all of whom ship their products in interstate commerce. Also included are manufacturers of tanks and barrels in which petroleum products are shipped from Texas to other States (R. 60, 72) as well as processors of ingredients of building materials which leave Texas (R. 52, 59).

Apart from these and others producing goods for commerce, plants guarded by appellees' employees are also engaged in commerce in distributing to points outside Texas steel products (R. 58, 60, 89), food products

and groceries (R. 51, 57, 63), construction equipment and oil field supplies (R. 41, 44, 56, 70, 71, 73, 74), food products (R. 50), tires, other rubber products and automotive accessories (R. 57, 64, 66), mechanical and marine equipment (R. 53, 73, 67), and other goods (R. 59, 60, 64, 69, 73), originating both in Texas and other States.

The District Court denied the Administrator's prayer for an injunction, holding that "defendants are a service establishment, and defendants' employees or watchmen are engaged in a service establishment" within the exemption from Sections 6 and 7 provided by Section 13 (a) (2) (R. 235–236). Because of its ruling on this issue, the District Court found it unnecessary to decide whether the watchmen are engaged in "production for commerce" within the meaning of Sections 6 and 7 of the Act (R. 234).

QUESTIONS PRESENTED

1. Whether watchmen employed by a maintenance supply company to guard factories, plants, warehouses, and other establishments producing goods for interstate commerce or distributing goods in commerce are themselves engaged in commerce or the production of goods therefor.

2. Whether a maintenance supply company which assigns watchmen to guard places of business at which transactions in commerce or production for commerce are carried on is a "service establishment" within the meaning of Section 13 (a) (2) of the Act.

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SPECIFICATION OF ERRORS

The District Court erred:

1. In entering judgment for appellees.

2. In failing to issue an injunction as prayed in the complaint.

3. In concluding that appellees' failure to pay their employees wages at the rates required by Sections 6 and 7 of the Act did not violate the Act.

4. In failing to hold that appellees' employees engaged in guarding factories, warehouses, and other establishments engaged in commerce or the production of goods for commerce were themselves so engaged.

5. In holding that appellees' employees were engaged in a service establishment and exempt from the Act under Section 13 (a) (2).

ARGUMENT

I

Appellees' employees guarding plants engaged in the production of goods for commerce or in the distribution of goods in commerce are within the scope of the Act

A substantial number of the establishments watched and protected by appellees' employees produce goods for commerce or engage in transactions "in commerce." Among these are factories at which goods are manufactured for direct extrastate shipment, plants of metal dealers who process scrap for shipment directly into other States or indirectly to local dealers for subsequent interstate shipping, plants making ingredients of other products which move in interstate commerce, manufac-

turers of drums and tanks used for the interstate shipment of oil, and warehouses of wholesale distributors who receive goods from extrastate points and ship substantial quantities of merchandise to extrastate destinations. Plainly, the employees of these manufacturers and processors are engaged in "production for commerce" (*United States* v. *Darby,* 312 U. S. 100; *Enterprise Box Co.* v. *Fleming,* 125 F. (2d) 897 (C. C. A. 5), certiorari denied, 62 Sup. Ct. 1312 (1942); *Hamlet Ice Co.* v. *Fleming,* 127 F. (2d) 165 (C. C. A. 4), certiorari denied, 5 Wage Hour Rept. 826 (Sup. Ct. 1942), and the employees of the wholesalers are engaged "in commerce." *Fleming* v. *Jacksonville Paper Co.,* 128 F. (2d) 395 (C. C. A. 5), certiorari granted, No. 336, October 19, 1942; *Walling* v. *Goldblatt Bros.,* 128 F. (2d) 778 (C. C. A. 7), petition for certiorari pending, No. 418, October Term, 1942. It is equally plain that watchmen and other maintenance workers employed directly by companies producing for commerce or engaged in commerce are within the coverage of the Act. *Hamlet Ice, Jacksonville Paper,* and *Goldblatt* cases, all *supra; Bowie* v. *Gonzalez,* 117 F. (2d) 11 (C. C. A. 1); *Mid-Continent Pipe Line Co.* v. *Hargrave,* 129 F. (2d) 655 (C. C. A. 10); *Johnson* v. *Phillips-Buttorff Mfg. Co.,* 160 S. W. (2d) 893 (Tenn. 1942), certiorari denied, 5 Wage Hour Rept. 826 (Sup. Ct. 1942); *Fleming* v. *American Stores Co.,* 42 F. Supp. 511 (E. D. Pa.), pending on appeal to the Third Circuit.

The only question here is whether maintenance employees who would undoubtedly be within the scope of the Act if employed directly by companies engaged "in" or "production for commerce" are to be denied the benefits of the statute because their work is supplied to

such companies through the medium of an independent agency. Although the District Court failed to pass on this question (R. 234), the pertinent authorities require a negative answer. The application of Sections 6 and 7 turns exclusively upon the nature of the work performed by the individual employee without regard to the character of the employer's business. Indeed, "to the extent that his employees are 'engaged in commerce or in the production of goods for commerce,' the employer is himself so engaged." *Kirschbaum* v. *Walling,* 62 Sup. Ct. 1116, 1120 (1942), applying the Act to watchmen and other maintenance employees of the owner of a loft building occupied by manufacturers producing goods for commerce. Nor may appellees avoid the controlling force of the *Kirschbaum* case by pointing to the fact that their office, unlike that of the loft building owner in the *Kirschbaum* case, *supra,* is situated in a different building from the establishments guarded and protected by the watchmen. *Holland* v. *Amoskeag Mach. Co.,* 44 F. Supp. 884 (N. H.). Precisely because appellees' business differs in no significant respect from that of the Kirschbaum Company, other courts passing on the application of the Act to a maintenance supply company have decided the question in favor of coverage. *Lorenzetti* v. *American Trust Co.,* 45 F. Supp. 128 (N. D. Calif.), pending on appeal to the Ninth Circuit; *Haley* v. *Central Watch Service,* 5 Wage Hour Rept. 822 (N. D. Ill 1942).[3] A like conclusion is required here.

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[3] *Bowman* v. *Pace Co.,* 119 F. (2d) 858, decided by this Court, is not to the contrary; it holds narrowly that a watchman assigned by a maintenance supply company to guard the establishment of

II

Appellees' employees are not engaged in a service establishment within the meaning of Section 13 (a) (2) of the Act

Section 13 (a) (2) exempts from the wage and hour provisions of the Act "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." The District Court held that appellees operate a "service establishment" and that their employees, although working at factories, warehouses, scrap metal plants, and similar establishments, work "in" the service establishment assertedly operated by appellees. We submit that appellees have failed to carry the burden, incumbent upon all who rely on an exemption carved from the provisions of a remedial statute, of showing that their operations fall "within the words as well as within the reason" for the exemption. *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56 (C. C. A. 8); *Bowie* v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1). Appellees cannot prevail in their contention because they fail to meet

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a company producing goods for commerce may not maintain a suit under the Act against the company guarded because of the absence of the requisite employer-employee relationship between the parties. And *Schrieber* v. *Kane Service*, N. D. Ill., referred to by the court below (R. 234), was never decided. On defendant's motion to dismiss the complaint, Judge Holly had prepared an informal memorandum which was erroneously published as the opinion of the court in 3 Wage Hour Rept. 459. Subsequently the court denied the motion and set the case for trial. The case has not yet been tried. 4 Wage Hour Rept. 15 carries a correction of the previous publication. In the light of the *Haley* case *supra*, also decided by Judge Holly, but after the Supreme Court's opinion in the *Kirschbaum* case, *supra*, it is plain that the *Schrieber* case is without any force as a precedent.

the two conditions imposed by Section 13 (a) (2): (1) the establishment, if any, which appellees' business constitutes does not provide "service" within the intendment of the exemption; and (2) appellees' employees are not "engaged in" the asserted establishment.

Section 13 (a) (2) was not intended to exempt as "service establishments" businesses, such as appellees', engaged in supplying necessary employees to plants, factories, warehouses, and other concerns engaged in covered activities. Rather, the exemption was designed to exclude only local retailers and such analogous establishments as barber shops, beauty parlors, laundries, and service stations which also cater to the ultimate consumer but differ from retail establishments only in that they sell services rather than tangible goods. *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572 (C. C. A. 3), affirmed, 62 Sup. Ct. 1116 (1942). In framing the statute these two classes presented an identical problem and a common solution was reached as to each The terms "retail" and "service" are used together in the same sentence and the same requirement as to interstate commerce is made applicable to each. The legislative history makes it apparent that Congress intended by the use of the term "service" to exclude no new or wholly unrelated segment of the business community.

While the original bills contained no exemption for either retail or service establishments (H. R. 7200, S. 2475, 75th Cong., 1st sess. May 24, 1937), the committee hearings and debates reflect acute congressional concern about the application of the Act to small retailers and similar businesses. See Joint Hearings on

S. 2475 and H. R. 7200, 75th Cong., 1st sess. (1937) pp. 35–37; 83 Cong. Rec.7436–7438 (1938). As passed by the Senate, the bill merely exempted persons employed in a "local retailing capacity."[4] The House provided a further exemption for "any *retail industry* the greater part of whose selling is in intrastate commerce."[5] (Emphasis supplied.) This provision was changed by the Conference Committee to apply on an "establishment" rather than an "industry" basis and was, in addition, extended to include "service" establishments.[6] This was the form in which the exemption was enacted as Section 13 (a) (2). Although neither the Conference Committee report nor the debates in either house sheds light on the reason for this extension, it is a rational inference that the Committee desired to make clear that the exemption covered not only the local grocery store but the neighboring valet establishment as well. Without the addition of "service" establishments, there would have been considerable doubt as to whether the language employed included establishments selling intangible services rather than tangible goods. Had the insertion of the express provision for "service" establishments been intended to have any more far-reaching effect, it seems reasonable that an explanation of the change would have been forthcoming. The fact that no one challenged the addition indicates a rather uniform understanding that there was no intent to extend the exemption to include any unrelated group of establishments.

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[4] S. 2475, passed by the Senate July 31, 1937, Section 2 (a) (7).

[5] S. 2475, passed by the House May 24, 1938, Section 6 (c).

[6] H. Rept. 2738, 75th Cong., 3d sess. (1938), pp. 9, 32.

Appellees possess none of the characteristics distinguishing establishments exempted under Section 13 (a) (2). The interpretation of "service establishments" followed by the District Court nullifies the intent of Congress, destroys the legislative coherence of the exemption, and leads to confusion and uncertainty as to its scope. "Service" standing alone is indefinite. In a sense every business renders services. If "service establishment" is not read in connection with "retail establishment," the applicability of the exemption will depend upon the almost innumerable connotations of the vague term "service." The exemption would become a controversial issue in many types of cases—e. g., banks, telephone and telegraph companies, airlines, newspapers, trolley lines, railroads, motor carriers, employment agencies, warehouses of various types, and many others. But Section 13 (a) (2) was not intended so to apply. The statute provides other express exemptions for seasonal industries, stockyards handling livestock, establishments engaged in ginning and compressing cotton for farmers, carriers by air, certain small newspapers, interurban railways, local trolley and bus lines, warehouses handling, packing and storing agricultural commodities, small telephone exchanges, motor carriers and railroads.[7] Under the theory apparently followed by the District Court, these express exemptions are superfluous since each of the enterprises mentioned would be encompassed within the terms of Section 13 (a) (2). Stat-

[7] See Sections 7 (b) (3), 7 (c), 13 (a) (4), (8), (9), (10), (11), 13 (b) (1) and (2).

utes are not to be so capriciously interpreted. *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 393.

Moreover, the issue is foreclosed adversely to appellees by *Kirschbaum* v. *Walling*, 62 Sup. Ct. 1116 (1942) decided subsequent to the District Court's opinion, which denied the exemption to the owner of a loft building who supplied maintenance facilities to the manufacturers occupying the building. There are no significant differences between the *Kirschbaum* case and that at bar and denial of the exemption in the former impels a like result here. To the same effect see *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128 (N. D. Calif.), pending on appeal to the Ninth Circuit; *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.). Cf. *Fleming* v. *Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255 (E. D. Ky.); *Fleming* v. *Lincoln Loose Leaf Warehouse Co.*, 5 Wage Hour Rept. 615 (E. D. Tenn. 1942); *Boylan* v. *Liden Mfg. Co.*, 4 Wage Hour Rept. 158 (C. C. Mich., Ingham Co. 1941); *Mill* v. *United States Credit Bureau*, 5 Wage Hour Rept. 114 (S. D. Calif. 1941); *Yunker* v. *Abbye Employment Agency*, 32 N. Y. S. (2d) 715 (Munic. Ct. N. Y. City 1942).

The exemption is unavailable to appellees on another ground: the employees involved on this appeal are not "engaged in" the establishment, if any, operated by appellees because they perform all their work and are, therefore, necessarily "engaged in" the factories, plants, warehouses, and other business establishments which they guard. "Establishment" as used in Sec-

tion 13 (a) (2) connotes a physical place of business[8] (*Fleming* v. *American Stores Co.*, 42 F. Supp. 511 (E. D. Pa.), pending on appeal to the Third Circuit; cf. *Barfoot* v. *White Star Line*, 170 Mich. 349, 136 N. W. 437 (1912); *Bubb* v. *Missouri K. & T. R. R. Co.*, 89 Kans. 303, 131 Pac. 575 (1913); *Truman* v. *Kansas City M. & O. R. R. Co.*, 98 Kans. 761, 161 Pac. 587 (1916)) and the phrase "engaged in" has meaning only when considered in its frame of reference—the physical "establishment." And so holding is *Lorenzetti* v. *American Trust Co., supra.* In denying the exemption to a maintenance supply company which furnished to a bank engaged in commerce, watchmen and other maintenance employees who worked in and about the space occupied by the bank, the court stated (45 F. Supp. at 138):

> The phraseology used is significant. The words "engaged in any * * * service establishment" are not synonymous with "employed by any service business." The word "establishment" is defined as "the place where one is permanently fixed for residence or business * * * also any office or place of business with its fixtures." Webster's New International Dictionary, 1931 Ed. The janitors were employed by

[8] As noted *supra*, page 13, the House version exempted "any *retail industry* the greater part of whose selling is in intrastate commerce." (Emphasis supplied.) The rejection of this language in conference in favor of "retail establishment" is cogent evidence that Congress intended to restrict application of the exemption to physical places of business rather than to business enterprises as such.

the Building Company, but the establishments in which they were engaged were the banking establishments.

One other consideration merits comment. Many of appellees' employees formerly were employed by the manufacturers and distributors whose plants and premises they now guard. They performed the same duties then as now. When employed directly by the manufacturers and distributors, they were not engaged in a "service establishment." The transfer to another pay roll has not altered the characteristics of the establishments in which they still work. Yet unless reversed, the decision below will permit simple evasion of the Act "by the interposition of an independent contractor between the laborer and the interstate business receiving the benefit of his services." *Lorenzetti* v. *American Trust Co., supra,* at page 139. While we do not urge that appellees and their patrons have engaged in illegal evasion,[9] the construction of Section 13 (a) (2) advanced by appellees will, if sanctioned by this Court, throw wide the door for undesirable practices. The possibility of evasion through the independent contractor device, particularly with respect to custodial employees whose routine duties ordinarily do not require careful supervision, is not lightly to be dismissed. Normal economic compulsions will do much to persuade employers, who now hire their own watch, custodial, and other maintenance employees, to effect savings

[9] While the contracts were bona fide, they were concededly motivated, at least on the part of the customers, by a desire to save labor costs. Appellees' claim of exemption from the Act was one of their main selling points (R. 119–120).

in labor costs by causing the transfer of such employees to the pay rolls of maintenance supply companies. Although employment by independent contractors may be legal and at times necessary, an employee's rights under a statute geared to economic function may not be made to depend upon the fortuity of his being employed by a contractor rather than by the manufacturer to whose productive operations he is necessary.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with directions to issue an injunction as prayed in the complaint.

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OCTOBER 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

IN THE

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J. S. SONDOCK AND M. G. SONDOCK,
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Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Fifth Circuit,

AND BRIEF IN SUPPORT THEREOF

BRADY COLE,
Counsel for Petitioners

January, 1943,
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ALPHA LAW BRIEF CO., HOUSTON

SUBJECT INDEX

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The petitioners above named pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, whose decision in this case was filed December 12, 1942 (R. 242-244). No petition for rehearing was filed.

SUMMARY OF THE MATTER INVOLVED

Statement

This is an action brought by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C., Sec. 201, *et seq.)*, hereinafter referred to as "Act," to restrain petitioners from alleged violation of certain provisions of the Act. The District Court (Southern District of Texas, Houston Division) denied an injunction on the ground that petitioners, who furnish a local watchman or patrol service to their clients, constitute a service establishment and as such are exempt under the Act (R. 219-236, 235). The trial court did not determine whether petitioners' employees were covered by the Act if the exemption did not apply.

The Court of Appeals in reversing the decision of the District Court and remanding the cause, held that the employees were not engaged in a service establishment within the meaning of the Act and that "those watchmen charged with the protection and preservation of the buildings and machinery used to produce goods for commerce performed duties having an essential relationship to the process of producing and distributing goods in interstate commerce" (R. 242-244). The Circuit Court of Appeals reached the conclusion that petitioners' employees were not engaged in a service establishment within the meaning of the Act, "upon the authority of KIRSCHBAUM v. WALLING, 316 U.S. 517, and by analogous reasoning" (R. 243).

Facts

Petitioners and their predecessors have been continuously engaged for fifty years in furnishing a night watch service

to various clients within the City of Houston and environs, all within the State of Texas (R. 34). They have in their employ 34 full-time night watchmen who perform regular night watching services for petitioners' clients. In all cases, petitioners' contract with their clients to furnish watch service for an agreed fee, and they select their own employees to perform the service contracted to be furnished. These employees are responsible solely to petitioners for the performance of the duties assigned to them. They are employed and paid by petitioners, and the manner in which they do their work is directed entirely by petitioners. Petitioners maintain a downtown office in the City of Houston, and the watchmen report there from time to time for instructions, reports, and to receive their pay checks (R. 35).

A stipulation of the parties describes in detail the kind and character of places watched by petitioners' employees (R. 35-75). Ten of the 34 employees perform watchman service only in connection with private residences and retail and service establishments which admittedly are not covered by the Act (R. 35-38). One employee is a relief watchman, serving on the various "beats" on the nights that the regular men assigned to such "beats" are off (R. 47). One employee, although classified as a watchman, works mainly in petitioners' office at night and answers phone calls by watchmen reporting prowlers, robberies or depredations, and performs other miscellaneous duties in connection with the operation of the business (R. 47). Thirteen of the employees are engaged exclusively in watching ten concerns (R. 36, 40-47). The remaining 9 employees are employed on "beats," each "beat" having on it a number of places to watch, the number varying from 29 on "Beat No. 35" to 16 on "Beat No. 6." On some of the "beats" the vast majority of the places watched consist of private residences and local retail or service establishments not covered by the Act. For instance, "Beat No. 5"

has on it 21 places to watch, 20 of which are retail stores or residences. "Beats Nos. 1, 2 and 3," combined for efficiency, have on them 68 places to watch, including one vacant building and 59 local retail and service establishments. Twelve of the 16 places watched on "Beat No. 6" are local retail or service establishments, and 24 of 29 places watched on "Beat No. 35" are local manufacturing, wholesale, retail and service establishments (R. 38-40, 49-75). The employees assigned to beats are in reality patrolmen. Their function is very similar to that of policemen assigned to patrol specified "beats" at night.

Employees making regular nightly rounds carry watchmen's clocks into which, at each place on their respective "beats," they insert numbered keys which are located at points in and about the places watched (R. 187-188). These keys are so located as to require the watchman to cover the entirety of the client's premises (R. 126, 175, 189-190). The watchmen who devote their time exclusively to the protection of plants of individual clients perform similar functions except that their continuous presence throughout the night is required in and about the one place watched (R. 40-47, 97-99, 105, 123, 125, 133, 140, 164). Except in one instance where a special arrangement is made for the use of the client's time clock, petitioners own and furnish all of the time clocks used by the watchmen, as well as the keys and key station established at the places watched. Petitioners have nearly $4,000 invested in this character of equipment which is a necessary and integral part of the business of furnishing the watchman service (R. 194-195). Each watchman's clock has a paper dial on it which is changed daily. These dials show whether each watchman properly covered his assigned territory. The dials, except in one instance, are changed at petitioners' office (R. 211-213).

The District Court made the following unchallenged findings of fact based upon undisputed evidence:

1. Petitioners "serve approximately 294 clients, of whom approximately 59 are industrial concerns * * * and * * * 235 are owners of private residences or of purely local or intrastate concerns and about which there appears to be no dispute that they have no transactions whatever in interstate commerce" (R. 222-223). At the 59 industrial concerns petitioners' employees make their calls and do their watching at night when the plants are closed and not in operation except at three plants which are frequently in operation at such times (R. 224).

2. "All of these watchmen, without exception, are employed, discharged, directed and paid by defendants (petitioners). They are directed by defendants from a central office kept and maintained day and night by defendants, which office they visit as and when necessary, and with which they can (and) do communicate by telephone or by a clock and buzzer system owned and maintained by defendants" (R. 232-233).

3. "There is no evidence here, and apparently no claim, that defendants' contract with any of their clients was made to avoid the effect of the Act" (R. 233).

4. Petitioners' employees render petitioners' clients "no service other than a watch service" (R. 235).

Decision of the Circuit Court of Appeals

The court below did not disturb any of the findings of fact made by the trial judge, nor were any of those findings challenged by respondent. The Circuit Court did not hold that any of petitioners' employees were engaged in interstate commerce as distinguished from a process or occupation necessary to the production of goods for interstate com-

merce. It did hold (a question not passed on by the trial court) that "those watchmen charged with the protection and preservation of the buildings and machinery used to produce goods for interstate commerce performed duties having an essential relationship to the process of producing and distributing goods in interstate commerce" (R. 243). The court made no distinction between a watchman who devotes his time exclusively to watching the property of a concern engaged in the production of goods for interstate commerce and a watchman who patrols a beat having on it 21 places to watch, only one of which is engaged in the production of goods for such commerce. The degree of service rendered was totally disregarded, and the court ignored the fact *that a difference in degree may amount to a difference in kind.*

The court also held that petitioners' employees were not engaged in a service establishment within the meaning of Section 13(a)(2) of the Act. This conclusion was predicated solely "upon the authority of KIRSCHBAUM v. WALLING, 316 U.S. 517, and by analogous reasoning" (R. 243). There is nothing said or implied in that case, when applied to the facts of this case, which warrants the decision rendered by the court below.

QUESTIONS PRESENTED

1. It being undisputed that all, or at least the greater part, of the watchman service furnished by petitioners' employees is in intrastate commerce, are said employees engaged in a service establishment and consequently exempt from the operation of the Act by virtue of Section 13(a)(2) thereof?

2. Are those of petitioners' employees who perform patrol watchmen service for specified groups of clients, the large majority of which are not engaged in the production of goods for interstate commerce, themselves en-

gaged in a process or occupation necessary to the production of goods for interstate commerce and hence covered by the Act, merely because one or more of the clients for whom they perform patrol watchman service are engaged in such production?

3. Are any of petitioners' employees who perform any watchman or patrol service for a client who is engaged in the production of goods for interstate commerce, themselves engaged in a process or occupation necessary to such production so as to be covered by the Act?

Specification of Errors

The Court of Appeals erred:

1. In holding that petitioners' employees are not engaged in a service establishment within the meaning of Section 13(a)(2) of the Act.

2. In holding that any of petitioners' employees are covered by the Act.

3. In holding that any watchman employed by petitioners, as an independent agency, and charged with the duty of watching buildings and machinery used by a client of petitioners to produce goods for commerce is covered by the Act, even though this particular function consists of only a very small part of the total watchman service performed by such watchman on each tour of duty.

REASONS FOR GRANTING THE WRIT

The discretionary power of this Court is invoked upon the following grounds:

The Circuit Court of Appeals has erroneously decided the

following important questions of Federal law which have not been, but should be, settled by this Court:

(a) That employees employed by an independent agency and engaged exclusively in rendering for clients of the agency a local watchman service, all or the greater part of which is in intrastate commerce, are not engaged in a service establishment within the meaning of Section 13 (a) (2) of the Act. This Court has not decided what is meant by a "service establishment" as that term is used in the Act. The decisions of the lower Federal Courts are in conflict on this question. For example see WALLING v. SANDERS (U.S.D.C., Tenn), 5 W.H.R. 710; BURKE v. BROWN BAGGAGE CO. (U.S.D.C., Tenn.), 5 W.H.R. 700; LONAS v. NATIONAL LINEN SERVICE CORP. (U.S.D.C., Tenn.), 5 W.H.R. 533; CORBETT v. SCHLUMBERGER WELL SURVEYING CORP., 43 F. Supp. 605 (U.S.D.C., Tex.), discussed in the brief attached hereto, which in principle conflict with the decision rendered by the court below in this case. In view of the confusion resulting from the conflicting decisions and the extremely narrow definition adopted by the respondent in enforcing the Act, it is of national importance that an authoritative opinion be rendered which defines, as nearly as it may be clearly defined, the scope of the "service establishment" exemption.

(b) That a watchman, employed and directed by an independent agency, engaged exclusively in rendering for clients of the agency a local patrol watchman service is covered by the Wage and Hour provisions of the Act (29 U.S.C., Secs. 206 and 207) whenever, on the "beat" assigned to him, there is at least one client engaged in the production of goods for interstate commerce, and regardless of the fact that his "beat" may also include 20 other clients whose employees are not covered by the Act.

(c) That watchmen, employed and directed by an independent agency, engaged exclusively in rendering for clients of the agency a local watch service are covered by the Wage and Hour provisions of the Act if the clients for whom the watch service is performed engage in the production of goods for interstate commerce. The decision of the court below, in this respect, goes far beyond the holding of this Court in KIRSCHBAUM v. WALLING, supra. In this case the work of the watchmen, in the language of the KIRSCHBAUM case, "has only the most tenuous relationship to, and is not in any fitting sense 'necessary' to, the production" of goods for interstate commerce.

Prayer

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued to the Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court; that the decree of the Fifth Circuit Court of Appeals be reversed; and that petitioners be granted such other and further relief as may be proper.

Respectfully submitted,

BRADY COLE,
Counsel for Petitioners

BRIEF IN SUPPORT OF PETITION

Opinions Below

The District Court's opinion, with findings and conclusions (R. 219-236), is reported in 43 F. Supp. at page 339.

The opinion of the Circuit Court of Appeals (R. 242-244) is not yet reported.

Jurisdiction

The decision of the Circuit Court of Appeals below was filed December 12, 1942 (R. 242-244). No petition for rehearing was filed. Jurisdiction to issue the writ rests on Section 240(a) of the Judicial Code (28 U.S.C., Sec. 347) as amended by the Act of February 13, 1925.

Statement

The facts and rulings material to the consideration of the questions presented are fully stated in the foregoing petition. Unless otherwise indicated, all emphasis appearing herein is petitioners'.

Summary of Argument

The points of argument follow the specification of errors and the reasons relied upon for the allowance of the writ of certiorari.

ARGUMENT

I.

The Circuit Court of Appeals erred in holding that Petitioners' employees are not engaged in a service establishment the greater part of whose servicing is in

Intrastate Commerce withing the meaning of Section 13(a) (2) of the Act.

Section 13(a) (2) of the Act provides:

> "The provisions of Sections 6 and 7 (pertaining to wages and hours) shall not apply with respect to * * * any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate Commerce."

The Act neither defines the term "service establishment" nor directs or authorizes the Administrator, respondent herein, to do so.

Without discussing the matter, the court below simply held that petitioners' business did not constitute a service establishment. The only reason assigned for this decision was KIRSCHBAUM v. WALLING, supra, and "analogous reasoning." A careful study of the KIRSCHBAUM decision fails to disclose its applicability to this point or what the analogous reasoning was or could have been. The facts in this case are readily distinguishable from those in the KIRSCHBAUM case. Furthermore, in deciding that case this court merely held, so far as the claimed exemption is concerned, that "selling space in a loft building is not the equivalent of selling services to consumers, and, in any event, the 'greater part' of the 'servicing' done by the petitioners here is not in intrastate commerce." This court has not rendered any decision with reference to the application of the service establishment exemption to a business devoted exclusively to the sale and rendition of service, the greater part of which is in intrastate commerce; nor does this court now have pending before it, so far as petitioners have been able to learn, a case requiring such a decision.

In the absence of proof to the contrary, it is proper to assume that Congress used the term "service establishment" intending that it should have its usual and customary meaning.

We can think of no more descriptive phrase to apply to petitioners' business than that of "service establishment." The whole business is predicated upon the rendition of a class of service to ultimate consumers thereof. The watchman and patrol service performed for clients is complete in itself; it is not necessary for any service to either precede or follow it in order to accomplish fully the result said service is designed to produce. The word "establishment" is defined in Funk & Wagnall's Standard Dictionary as "something established, *as a body of employees,* a military organization, or a state church." If the exemption in question means anything at all, it must include "bodies of employees" whose work is the rendition of some specialized form of service, such as the night watch and patrol service here involved.

Respondent has heretofore contended, as outlined in his Interpretative Bulletin No. 6, that the service establishment exemption should be limited to businesses such as barber shops, beauty parlors, public baths, scalp-treatment establishments, masseur establishments, funeral homes, crematories, home laundries, shoe-shining parlors, etc. To sustain this contention would convict Congress of inserting a meaningless and nugatory exemption. Surely these activities are purely local in their nature and need no exemption.

Respondent has heretofore argued that, if the exemption is not confined as contended by him, then the expressed exemptions applying to stockyards handling livestock, carriers by air, railroads, motor carriers, etc., are superfluous because encompassed within the terms of Section 13 (a) (2). This argument is unsound. The service establishment exemption applies only to those establishments *the greater part of whose servicing is in intrastate commerce.* The exemption of stockyards, carriers by air, railroads, motor carriers, etc., is applicable *regardless of the extent of their interstate activities.* The error in respondent's reasoning is further illustrated by Section

13 (a) (9), 29 U.S.C., 213 (a) (9), which exempts "any employee of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, *not included in any other exemption contained in this section.*" The words "not included in any other exemption contained in this section" have, and can have, reference only to the service establishment exemption included in the same section of the Act. No other exemption in the same section can possibly apply. These words clearly show that Congress understood that employees of a street, suburban or interurban electric railway, local trolley or motor carrier *were already exempt as engaged in a service establishment provided the greater part of their employer's servicing was in intrastate commerce.* Congress desired to make the exemption absolute as to such employees and consequently Section 13 (a) (9) was included for this purpose.

A number of the lower federal courts have repudiated the narrow construction which has been placed upon "retail or service establishments" by the Administrator in Interpretative Bulletin No. 6. In said bulletin it is stated that a linen service company is not a service establishment because it renders a substantial portion of its service to commercial clients. In LONAS v. NATIONAL LINEN SERVICE CORP. (U.S.D.C., Tenn.) 5 W.H.R. 533, the court held directly to the contrary and said:

> "In actuality this motion of defendant to dismiss the proceedings turns on whether departmental interpretative bulletin is in fact an interpretation and application of Section 13 (a) (2) of the Fair Labor Standards Act of 1938, or *is merely a misconstruction of clear and unambiguous language.*
>
> "The court is aware of the respect to which the construction and opinions of administrators are entitled where the language is such that from it more than one congressional intent can be spelled, and where the administrative construction has been acquiesced in until

it is more than a mere opinion as to what Congress may have intended outside and beyond what the words they employed are usually taken to mean.

"The exemption created by Section 13(a) (2) is not subject to the narrow coverage contended for by the plaintiffs, in my opinion. A service establishment to be entitled to the exemption *need not bring itself within the qualifying test of the interpretative bulletin.* The exemption in the Act does not limit its customers nor require them to sell at retail.

"In argument it was plainly the purpose of plaintiff to recover solely upon the theory of the exemption set out in Administrator's Bulletin No. 6. With the bulletin, I find myself in disagreement * * *

* * *

"I see no application of the Arsenal and Kirschbaum cases here, as the particular reference therein to service establishments sheds no light on the view the Supreme Court entertained as to the soundness of Bulletin No. 6."

This decision was rendered thirty days after the Supreme Court's decision in the KIRSCHBAUM case.

The court below on two occasions has announced its disagreement with Interpretative Bulletin No. 6. In SUPER-COLD SOUTHWEST COMPANY v. MCBRIDE, 124 F. (2d) 90 (5th C.C.A.), JUDGE HUTCHESON, in commenting upon the Administrator's narrow definition of "retail establishment," said:

> "The Act is unambiguous and operates to exempt all those coming within its terms and those terms cannot be enlarged or diminished by rulings of the Administrator, such as that, because sales are made to commercial instead of to private users they are not sales at retail. If, therefore, defendant were otherwise a retail dealer, we should hold it exempt though the retail sales were made to commercial rather than to private users."

In WHITE MOTOR COMPANY v. LITTLETON, 124 F. (2d) 92 (5th C.C.A.), JUDGE HOLMES likewise repudiated the crippling definition of "retail" advocated by the Administrator. He said:

> "The word *retail* is not defined by the Act. Given its common and ordinary acceptation when used in sales parlance, it means a sale in small quantity or direct to the consumer, as distinguished from the word *wholesale*, meaning a sale in large quantity to one who intends to resell. The character of the sale is not altered by the use to which the consumer may put the purchased commodity. These sales were predominantly retail although the products sold were subsequently for commercial purposes." (Emphasis supplied by the court).

Petitioners have nothing but service to sell and that is all sold within a single state to ultimate consumers. The service that they sell is no different whether rendered at a private residence or at a plant engaged in the production of goods for interstate commerce. In fact two of petitioners' employees are regularly assigned to watch only one residence each, and another is assigned to watch only a dance hall (R. 35-36). If all of the watchman service consisted only of watching residences, then even respondent would concede that the employees are engaged in a service establishment. Now, if the Fifth Circuit Court of Appeals is correct in holding a sale may still be a retail sale although made to a *commercial* rather than a *private* user, then it must be equally true that petitioners' business is just as much a service establishment when it performs service for an *industrial or commercial client* as when it performs exactly the same kind of service for an *individual client at his residence*. The principles announced by the Fifth Circuit Court of Appeals in the two cases last quoted from above and in this case cannot be reconciled.

In HUNT v. NATIONAL LINEN SERVICE CORP., 157 S.W.

(2d) 608 (Tenn.), the Supreme Court of Tennessee held that a linen service company is a service establishment exempt under the Act even though some of its customers were industrial or commercial concerns, as distinguished from private families. The corporation leased its linen to clients and for a specified price kept it laundered. The court said:

> "We do not consider either the fact that defendant manufactures the linens and other supplies which it uses in some other state, or that some of defendant's customers are industrial or commercial business firms, as distinguished from private families, of controlling importance. This appears to have been given some significance through certain bulletins released by the Wage and Hour Administrator."

While the decisions are by no means uniform, and for this reason the question should be settled by an authoritive decision of this court, there are a number of cases which sustain the conclusion of the trial court that petitioners' employees are engaged in a service establishment within the meaning of the Act.

In WALLING v. SANDERS, (U.S.D.C., Tenn.) 5 W.H.R. 710, it appeared that the employer sold automatic phonographs to operators and likewise maintained a department for servicing the machines and installing "remote control" equipment on them. The machines were serviced both in the repair shop of the employer and on location, and the installation of the equipment was generally made on location. Approximately 90% of the sales and installations were within the State of Tennessee where the business was located. The court held that the business of selling, repairing and making installations on the automatic phonographs was exempt as constituting a retail and service establishment.

In BURKE v. BROWN BAGGAGE CO., (U.S.D.C., Tenn.), 5 W.H.R. 700, it was held that a taxicab company is a ser-

vice establishment. The particular employees who brought suit for alleged unpaid compensation under the Act were engaged in driving a truck which was used to carry baggage to and from railroad stations. This part of the business constituted only about 2% of the total business of the company, and at least 98% of the servicing was in intrastate commerce.

In CORBETT v. SCHLUMBERGER WELL SURVEYING CORP., 43 F. Supp. 605 (U.S.D.C., Tex.), it appeared that defendant was "engaged, with crews of men and patented mechanism belonging to it, in the business of logging wells and in the business of perforating the casing of wells drilled for the production of oil or gas, not for itself, but for others upon the leases of others. Plaintiff Corbett was * * * from time to time a member of one of its crews. Defendant had no interest in the wells upon which it and the plaintiff and its other employees worked, nor in the land or leases upon which the wells were located." The court held:

> "That defendant is a service establishment within the quoted provision, I entertain no doubt. It did not sell goods. It sold service. The service sold was service it was able to render because of patents owned by it and which presumably could not be rendered by any other person."

In GREEN v. EAST TEXAS MOTOR FREIGHT LINES, 1 W.H. Cases 1169 (Tex.), it was held that an employee of one performing pickup and delivery service for a common carrier motor freight line was not covered by the Act because employed in a service establishment.

In the court below, respondent also contended against the application of the service establishment exemption because petitioners' employees do not perform all of their work within the physical boundaries of petitioners' office. It was argued that "engaged in any * * * service establishment" refers only to employees who perform all of their service at their employer's place of business. Here again, respondent was insisting upon

too narrow a construction, and one which, if adopted, would lead to absurd results.

In his Interpretative Bulletin No. 6, respondent cites a home laundry as a typical example of a service establishment coming within the exemption. It is well known that a large percentage of the employees of most laundries consist of truck drivers who pick up dirty laundry from the customers and deliver clean laundry to them. These drivers spent only a small fraction of their time on the premises of the laundry building. If we follow respondent's argument, they would not be exempt because they are not employed exclusively within the physical boundaries of the laundry.

If respondent's argument is sound, then it applies equally to employees of a retail establishment. It would exclude from the exemption delivery truck drivers and outside buyers of every large retail store. It has often been held that these outside employees are exempt as being employees of a retail establishment.

In PRESCRIPTION HOUSE, INC., v. ANDERSON, 42 F. Supp. 874 (U.S.D.C., Tex.), it was held that the employer constituted a retail establishment and hence certain employees who spent practically all of their time in making outside deliveries were exempt under the Act.

The decisions clearly show that the words "engaged in any * * * service establishment" mean engaged in the work of any service establishment. They do not mean that the employees must be engaged within the physical boundaries of a particular office, shop or plant owned and operated by the employer. Otherwise the employees who service automatic phonographs on location in WALLING v. SANDERS, supra, the drivers of taxicabs and baggage trucks in BURKE v. BROWN BAGGAGE COMPANY, supra, the crew members in CORBETT v. SCHLUMBERGER WELL SURVEYING CORPORATION, supra, the truck drivers in LONAS v. NATIONAL LINEN SERVICE COR-

PORATION, supra, and the employees engaged in the freight pick-up and delivery service in GREEN v. EAST TEXAS MOTOR FREIGHT LINES, supra, could not have been, as they were held to be, exempt as employees of service establishments.

Petitioners respectfully submit that the court below erred in holding that their employees were not engaged in a service establishment exempt under the Act.

II.

The Circuit Court of Appeals, irrespective of the application of the service establishment exemption, erred in holding that any of petitioners' employees were covered by the Act; and this conclusion applies particularly to those employees whose service in watching the premises of one or more clients engaged in the production of goods for interstate commerce is but a small portion of the patrol service rendered by each such employee on each tour of duty.

The employees whom the court below held are subject to the Act fall into two groups:

(a) Those who devote their time exclusively to watching the premises of one client which is engaged in the production of goods for interstate commerce; and

(b) Those who serve from 16 to 29 clients on a single "beat," one or more of which clients are engaged in the production of goods for interstate commerce; but in no instance are more than 36 per cent of the clients on any beat engaged in such production, and in one instance the percentage is as low as 4.2 per cent.

The applicable provisions of the Act are:

"Section 3(j): 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any state.

"Section 6(a): Every employer shall pay to each of his employees who is engaged in (interstate) commerce or in the production of goods for (interstate) commerce wages at the following rates (here follows the specification of minimum rates)."

"Section 7(a): No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in (interstate) commerce or in the production of goods for (interstate) commerce (here follows specification of hours)."

The court below predicated the application of the Act to any of petitioners' employees solely upon the basis that they were engaged in a "process or occupation necessary to the production" of goods for interstate commerce. No other basis could possibly apply because it is obvious that the watchmen are engaged neither in interstate commerce nor in actual production of goods as they perform no service other than a night watching or patrol service.

While there are many decisions holding that watchmen employed directly by a concern engaged in the production of goods for commerce are covered by the Act, many of these cases can be distinguished on the ground that the watchmen performed some service other than merely watching, such as firing a boiler, and keeping up steam (WOOD v. CENTRAL SAND & GRAVEL CO., 33 F. Supp. 40 [U.S.D.C., Tenn.]), etc. Other decisions, dealing exclusively with watchmen who are engaged solely in watching the premises of their em-

ployer, hold that such watchmen, regardless of the business of the employer, are not covered by the Act. ROGERS v. GLAZER, 32 F. Supp. 990 (U.S.D.C., Mo.); HART v. GREGORY, 10 S.E. (2d) 644 (N.C.).

The only cases involving employees of an independent agency, rendering solely night watch and patrol services, have held that such employees are not covered by the Act, irrespective of the interstate activities conducted at the places watched. FARR v. SMITH DETECTIVE AGENCY AND NIGHT WATCH SERVICE, 38 F. Supp. 105 (U.S.D.C., Tex.); SCHRIEVER v. KANE SERVICE, I W.H. Cases 381 (U.S.D.C., Ill.); BARTHOLOME, ET AL., v. BALTIMORE FIRE PATROL & DESPATCH CO., 6 W.H.R. 21 (U.S.D.C., Md.).

The Circuit Court of Appeals felt that the decision of this Court in KIRSCHBAUM v. WALLING, supra, compelled a decision in this case that the Act applied to any employee who spent any part of his time watching the premises of a client engaged in the production of goods for interstate commerce. Petitioners submit that the KIRSCHBAUM case does not compel such a result. That case involved the owners of loft buildings. In addition to watchmen, they employed engineers, firemen, electricians, elevator operators, carpenters and porters. Practically all of the tenants were engaged within the building in producing goods for commerce. The activities of the employees of the two buildings are described by this Court as follows:

> "The engineer and fireman produce heat, hot water and steam necessary to the manufacturing operation. They kept elevators, radiators, and fire sprinkling systems in repair. The electrician maintained the system which furnishes the tenant with light and power. The elevator operators run both the freight elevators which start and finish the interstate journeys of goods going from and coming to the tenant, and the passenger elevators which carry employees, customers, salesmen and

> visitors. The watchmen protect the buildings from fire and theft. The carpenters repair the halls and stairways and other parts of the building commonly used by the tenant. The porters keep the building clean and habitable."

Thus it is readily apparent that the owners of the buildings, through their employees, contributed in large measure to the production of goods for commerce. A substantial part of this contribution was absolutely essential; without it, production would have been impossible. The case was defended on the ground that none of the employees were covered by the Act; no contention was made that, if some of the employees were covered, nevertheless others were not. The watchman service was but part of the total function performed by the building owners which included selling and maintaining space in the buildings, furnishing heat, light, steam, elevator service, etc. This Court treated the employees in each building as a unit making necessary, and in part indispensable, contributions to the production of goods for interstate commerce. This decision is a far-cry from holding that a watchman, employed, directed and paid by an independent agency and performing only a watching service for a concern engaged in the production of goods, is himself engaged in an occupation necessary for such production so as to be covered by the Act. This Court issued a clear warning in the KIRSCHBAUM case that its decision must not be misconstrued as we believe the court below has misconstrued it in this case. Among other things this Court said:

> "The lower court in No. 924 met the petitioners' argument by finding the act applicable to these employees because their work was 'in kind substantially the same as it would be if the manufacturers employed them directly.' In the immediate situation, the answer may be adequate; ***but as a guiding criterion it may prove***

> *too much.* 'Necessary' is colored by the context not only of the terms of the legislation but of its implication in the relation between state and national authority. We cannot, in construing the word 'necessary,' escape an inquiry into the relationship of the particular employees to the production of goods for commerce. *If the work of the employees has only the most tenuous relationship to, and is not in any fitting sense 'necessary' to, the production, it is immaterial that their activities would be substantially the same if the employees worked directly for the producers of goods for commerce."*

Petitioners submit that the work of its employees in providing exclusively a night watch and patrol service "has only the most tenuous relationship to, and is not in any fitting sense 'necessary' to, the production" of goods. To hold otherwise would be equivalent to bringing under the Act every employee, regardless of by whom employed, who had any remote, indirect connection with the production of goods. Such a decision would produce a *reductio ad absurdum,* such as is warned against in WARREN-BRADSHAW DRILLING CO. v. HALL, 124 F. (2d) 42, affirmed 63 S.C. Rep. 125, and JOHNSON v. FILSTOW, INC., 43 F. Supp. 920 (U.S.D.C., Fla.).

The foregoing applies to all of petitioners' employees, but it is particularly applicable to those who patrol "beats," each of which covers a large number of clients, only a very few of which are engaged in the production of goods for interstate commerce. The inapplicability of the KIRSCHBAUM case to such a situation is clearly pointed out in BARTHOLOME, ET AL., v. BALTIMORE FIRE PATROL & DESPATCH CO. (U.S.D.C., Md.), 6 W.H.R. 21. In that case the employer, an independent agency, furnished night patrolmen to contract customers. Each patrolman was placed on a "post" containing from 28 to 92 places to be watched. The trial judge com-

mented upon the similarity between our case and the case before him. After discussing and extensively quoting from the KIRSCHBAUM decision, the court said:

> "If this service rendered by the plaintiff is properly to be called watchman service at all, it is apparent that it is greatly lesser in degree than that of such a watchman as was referred to in the Kirschbaum case. *A difference in degree may amount to a difference in kind.* The services performed by the plaintiffs were substantially only supplemental to the ordinary activities of the public police on night duty. It would seem to be an extreme contention that the ordinary 'policemen on the beat' is engaged in the production of goods for interstate commerce.
>
> " * * * I do not think it can be fairly said that the plaintiffs' services were 'necessary' in the production of goods for commerce, even if we could find that some of the defendants' customers were in fact producing goods for interstate commerce.
>
> * * *
>
> "Therefore here the word 'necessary' should at least connote 'substantially' necessary. The limited nature of the patrolman service given the buildings of the defendants' subscribers cannot fairly be said to be 'substantially' necessary to their business. It is common knowledge that thousands, and doubtless the great majority, of such business buildings do not have this special patrolman service, but rely on the ordinary public police protection."

Conclusion

For the reasons assigned, the court below erroneously decided questions of Federal law which have not been, but should be, settled by this Court. Petitioners respectfully pray that a writ of certiorari be issued herein to the end that said

errors may be corrected and the questions of Federal law settled by this court.

Respectfully submitted,

BRADY COLE,
Counsel for Petitioners

January, 1943,
Houston, Texas

INDEX

CITATIONS

512474—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 683

J. S. SONDOCK AND M. G. SONDOCK, INDIVIDUALLY AND AS PARTNERS DOING BUSINESS UNDER THE NAME OF MCCANE-SONDOCK DETECTIVE AGENCY, PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 219–236) is reported in 43 F. Supp. 339. The opinion of the Circuit Court of Appeals (R. 241–242) is reported in 132 F. (2d) 77.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 12, 1942 (R. 243). The

petition for a writ of certiorari was filed on January 29, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether watchmen guarding plants producing goods for interstate commerce are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.[1]

2. Whether a company which supplies watchmen to guard industrial concerns and other places of business, as well as some private residences, is a service establishment within the meaning of Section 13 (a) (2).

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201) provide as follows:

> SEC. 6 (a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates— * * *
>
> Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for

[1] The court below stated that employees contributing to the consummation of transactions in interstate commerce were engaged in commerce within the meaning of the Act. Petitioners, however, have not presented this question for review. (Pet. pp. 6–7, 21.)

commerce— * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 3. As used in this Act— * * * (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 13 (a). The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *

STATEMENT

On June 6, 1941, the respondent brought suit (R. 6–11) to restrain petitioners from violating the provisions of the Fair Labor Standards Act, alleging that many of their employees were engaged in commerce and in the production of goods for commerce. Petitioners conceded noncompliance with the provisions of the Act but denied its applicability to their employees' work and asserted affirma-

tively that their business was exempt as a "service establishment" within the meaning of Section 13 (a) (2). (R. 24–28, 28–33.)

Petitioners employ approximately 34 night watchmen in and about Houston, Texas, to guard the premises of their customers pursuant to contracts. (R. 35, 222.) Some employees are assigned to guard industrial and commercial plants, warehouses, factories, and other establishments engaged in the production of goods for commerce or in interstate commerce, while others are detailed to watch private residences and retail and service establishments.[2] (R. 223–233, 35–75.) All watchmen are carried on petitioners' pay roll and are employed by them, but work at the customers' establishments. (R. 35.) The owners of the guarded premises pay petitioners an agreed price for the work done by the watchmen. (R. 35.)

The employees involved in the appeal below fall into two categories: those whose work requires them to make regular rounds or beats throughout the night guarding a number and diversity of business establishments, and those assigned to guard exclusively the manufacturing establishment or plant of a single customer. (R. 223–233.)

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[2] The appeal below did not involve employees in the latter category or those employees irregularly or occasionally employed by appellees for special assignments as private detectives or guards. (See Appellant's Brief in the Circuit Court of Appeals, p. 3, a copy of which has been filed with the clerk of this Court.)

Although technically under the direction of petitioners, the watchmen are actually supervised, in many instances, by petitioners' customers. Watchmen whose work is unsatisfactory to the customer are replaced upon request (R. 122, 216) and in one instance the watchman's wages and hours were prescribed by the customer (R. 216). Petitioners' customers apparently found the employment of watchmen necessary to the proper operation of their businesses. Some, before entering into contracts with petitioners, employed men on their own pay rolls to perform the same tasks. These were later employed by petitioners for the same work (R. 100–101, 122, 163–165). Other businesses, after discontinuing their contracts with petitioners have undertaken to re-employ watchmen (R. 91–92, 105–106) and have hired the man previously furnished by petitioners (R. 91–92, 138–139, 163–165).

The watchmen in many instances guard the plants of concerns engaged in the production of goods for commerce (R. 40, 41–42, 43, 43–44, 45–46, 46–47); they protect the plants and premises of their employers' customers from marauders and thieves and guard against fires. (R. 130–131, 134, 140.)

The District Court denied the Administrator's prayer for an injunction, holding that "Defendants are a service establishment, and Defendants' employees or watchmen are engaged in a service establishment" within the exemption from Sections

6 and 7 provided by Section 13 (a) (2) (R. 235–236). Because of its ruling on this issue, the District Court found it unnecessary to decide whether the watchmen are engaged in "production for commerce" within the meaning of Sections 6 and 7 of the Act (R. 234). The Circuit Court of Appeals reversed this ruling, holding that the employees were not engaged in a service establishment, and held further that the watchmen who guarded buildings and machinery used to produce goods for commerce were engaged in the production of goods for commerce within the meaning of the Act. It remanded the cause to the District Court for further proceedings not inconsistent with its opinion (R. 241–242).

ARGUMENT

The decision of the court below is correct and does not call for further review.

1. The petitioners urge that watchmen for concerns engaged in the production of goods for commerce perform services only tenuously related to production (Pet. p. 24). But in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, this Court held that watchmen performed services necessary to production and were therefore engaged in production within the meaning of Section 3 (j). The petitioners urge a distinction between that case and the present one, in that the employer here was engaged solely in supplying watchmen (Pet. p. 23). However, as the *Kirschbaum* case held, the business of the employer is not determinative;

coverage depends upon the activities performed by the employees. See also *Warren-Bradshaw Drilling Co.* v. *Hall,* No. 21, present Term; *Walling* v. *Jacksonville Paper Co.,* No. 336, present Term; *Overstreet* v. *North Shore Corp.,* No. 284, present Term. In the *Kirschbaum* case, as here, the watchmen were not employed by one whose primary business was the production of goods for commerce. The watchmen were employed by the owner of a loft building, the tenants of which were manufacturers. The services of the watchmen as well as other employees were provided by the building owner. Disregarding the general nature of the employer's business, the Court held the services of the watchmen necessary to production. Whether the watchmen are employed by the manufacturer directly, by a landlord supplying the watchmen to the manufacturer, or by an agency engaged solely in supplying watchmen to manufacturers and others is therefore immaterial. Employees engaged in the protection of buildings from fire and theft perform services necessary to production and are within the Act's coverage. *Johnson* v. *Phillips-Buttorff Manufacturing Company,* 160 S. W. (2d) 893 (Tenn.), certiorari denied, No. 193, present Term.

2. Petitioners also urge that their business is a service establishment within the exemption provided by Section 13 (a) (2) because they are engaged exclusively in supplying the services of

watchmen to industrial and other users. The *Kirschbaum* case, in which a similar contention was advanced, also disposes of this question. The Court stated (page 526) "selling space in a loft building is not the equivalent of selling services to consumers * * *." Upon similar reasoning, as held by the court below, supplying watchmen to industrial concerns is not the equivalent of selling services to consumers. Other circuit courts of appeal have similarly considered the service establishment exemption applicable only to establishments, comparable in nature to retail organizations, which serve the general consuming public. *Fleming* v. *Arsenal Bldg. Corp.,* 125 F. (2d) 278, 280 (C. C. A. 2); *Fleming* v. *A. B. Kirschbaum Co.,* 124 F. (2d) 567, 572–573 (C. C. A. 3); *Lagerstrom* v. *Hanson* (C. C. A. 8), decided Feb. 8, 1943; *Consolidated Timber Co.* v. *Womack,* 132 F. (2d) 101 (C. C. A. 9).

3. Finally, the petitioners urge that the court below erred because it held that watchmen, whose "beats" might include only one firm engaged in production for commerce and twenty others not so engaged, were subject to the coverage of the Act. We believe this contention does not accurately characterize the decision of the court below. Its decision is in general terms and makes no attempt to frame a decree which would indicate which employees of petitioners were covered, and which were not. (R. 242.) The District Court held that petitioners' business was a service establishment and

therefore made no findings with respect to the activities of any of petitioners' employees in production for commerce. The court below held, in accordance with this Court's opinion in the *Kirschbaum* case, that the service establishment exemption did not apply and that watchmen for concerns engaged in production for commerce were themselves engaged in production for commerce. It reversed the judgment of the District Court and remanded the case for further proceedings not inconsistent with its decision. Thus, it will be the duty of the District Court to determine from the facts which employees perform the functions which the Circuit Court of Appeals held to be covered by the Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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FEBRUARY 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943